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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

No. 1038 79

JOHN G. GETZ, JR.,

Respondent,

7411 *vs.*

CITY OF HARVEY,
a municipal corporation, et al., etc.

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

and

BRIEF IN SUPPORT THEREOF

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, City of Harvey, a municipal corporation, organized and existing under and by virtue of the laws of the State of Illinois, Frank W. Bruggemann, its Mayor, Charles H. Applegate, Jr., Arthur E. Turngren, Norman C. Gallett, George P. Fisher, its Commissioners, Frank C. Norton, its Clerk, W. L. Voss, its Treasurer, and R. Wm. Mallstrom, Superintendent of the Water Department of the City of Harvey, respectfully pray for the issuance of a writ of certiorari herein directed to the

United States Circuit Court of Appeals for the Seventh Circuit to review a certain final decision and opinion of said court rendered and filed in the above entitled cause on February 28, 1941. (R. 928)

A petition for rehearing was filed by petitioners on March 14, 1941, within fifteen days after entry of judgment in said cause, as prescribed by Rule 22 of the Rules of the United States Circuit Court of Appeals for the Seventh Circuit. (R. 947)

An order denying the petition for rehearing, but modifying the opinion theretofore filed in said cause was entered in the United States Circuit Court of Appeals for the Seventh Circuit on April 7, 1941. (R. 965)

This petition for the issuance of a writ of certiorari, together with supporting brief and a certified transcript of record are filed in this court within three (3) months after the entry of said order in the United States Circuit Court of Appeals for the Seventh Circuit denying said petition for rehearing.

I.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

This is a suit in equity brought in the United States District Court for the Northern District of Illinois, Eastern Division, by John G. Getz, Jr., respondent herein, a citizen of the State of Michigan, against the City of Harvey, a municipal corporation of the State of Illinois, its Mayor, Commissioners, City Clerk, City Treasurer and Superintendent of the Water Department, petitioners herein.

In this suit respondent alleges that he is the owner and holder of $243,000.00 par value water certificates of in-

debtedness of said City of Harvey, payable solely from revenues derived from the operation of a water works system of said City designated as Water Works System No. 2. Respondent claims that said certificates of indebtedness are legal and binding obligations of the City of Harvey; that petitioners have misapplied or otherwise illegally diverted some portion of the revenues derived from the sale of water by the City of Harvey and asks; for an accounting of all moneys received or collected from the sale of water by the petitioner, City of Harvey, its officials and agents; that the proportionate share which is allocable to Water Works System No. 2 be determined from the moneys so collected; for judgment against the petitioners herein for such sums as are found to have been illegally diverted from a special water fund designated as Special Water Fund No. 2; for an order restraining the petitioners from diverting or in any other manner misapplying funds belonging to Special Water Fund No. 2 and for the appointment of a Receiver of all the property and assets of said Water Works System No. 2. (R. 14, 15)

Petitioners in and by their answer urge two grounds of defense to the charges made in the complaint. Firstly, that the water certificates of indebtedness allegedly owned and held by the respondent, John G. Getz, Jr., are invalid and void. Secondly, should the court find that said water certificates of indebtedness are valid, that they are non-negotiable instruments under the law of the State of Illinois, and therefore are subject to any existing rights and defenses, which defendant, City of Harvey has or could interpose against A. C. Allyn & Company, who acquired said certificates pursuant to the terms of a written agreement with the City of Harvey, whereby said A. C. Allyn & Company agreed to refund all of the outstanding certificates of the City of Harvey. (R. 22)

The cause was referred to a Master in Chancery of the District Court, who, after extended hearings, rendered his revised and substituted report, in which he ruled that the petitioner, City of Harvey, was estopped to deny the validity of the water fund certificates of indebtedness of the City of Harvey, payable solely from the Special Water Works Fund No. 2, but allowed the alternative relief prayed for by the petitioner, City of Harvey and ordered the respondent, John G. Getz, to deliver up to the Clerk of the District Court the said $243,000.00 par value certificates of indebtedness held by him to be in turn delivered to the City of Harvey upon the payment by said City of the sum of $173,000.00, which was the sum found to have been expended by said A. C. Allyn & Company in acquiring said certificates together with interest on said sum from the day and date the several certificates were acquired by said A. C. Allyn & Co.

PROCEEDINGS IN THE DISTRICT COURT.

The Master found that respondent, John G. Getz, Jr., acquired the said $243,000.00 par value certificates of indebtedness involved in this suit "from C. S. Mott by an alleged purchase, and in payment therefor delivered to said C. S. Mott a collateral note in the sum of $243,000.00"; that said certificates of indebtedness constitute the collateral to said note, and that said C. S. Mott retains actual possession of said $243,000.00 certificates. (R. 880)

The respondent, John G. Getz, Jr., testifying in his own behalf, upon cross-examination, stated that he was employed by said C. S. Mott. (R. 349)

The Master further found that said C. S. Mott acquired

said certificates of indebtedness from Stifel Nicolaus & Co., Inc., investment bankers of Chicago, Illinois, and that said Stifel Nicolaus & Co., Inc. were in joint account with A. C. Allyn & Company, investment bankers of Chicago, Illinois, in the purchase of said certificates. (R. 880)

The Master found that there was a binding refunding contract made between the City of Harvey and A. C. Allyn & Company, through its agent O'Brien, which A. C. Allyn & Company failed to perform. (R. 874)

The Master further found that, after purchasing $242,000.00 face value of said certificates for $172,450.00, through the aid and cooperation of the Commissioners of the City of Harvey, A. C. Allyn & Company abandoned the refunding contract with the City of Harvey. (R. 873)

The record in this case discloses that on January 14, 1937, A. C. Allyn & Company submitted a form of refunding ordinance to the officials of the City of Harvey, with a request that it be adopted by the City Council of said City, at the meeting to be held on January 18, 1937. (R. 755) The ordinance in the form submitted by said A. C. Allyn & Company was adopted by the City Council of the City of Harvey on January 25, 1937. (R. 702)

The record further discloses that A. C. Allyn & Company had, as a matter of fact, abandoned its refunding contract with the City of Harvey on January 15, 1937, for on that date, without notice to the City, A. C. Allyn & Company sold $220,000.00 of said certificates to one, William H. Donner of Philadelphia, Pennsylvania. (R. 725)

All relief sought by respondent was denied and a decree was entered in the District Court in accordance with the findings of the Master, as set forth in his revised and substituted report. (R. 856 to 882)

THE APPEALS TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

From that part of the decree, requiring the respondent to deliver to the Clerk of the United States District Court the said $243,000.00 par value certificates of indebtedness for delivery to the City of Harvey, upon the payment by said City of the said $173,000.00 and interest thereon, the respondent filed his appeal, and thereafter, from that part of the judgment, holding that the City of Harvey was estopped to deny the validity of said certificates, the petitioner, City of Harvey, appealed.

II.

JURISDICTIONAL STATEMENT.

The jurisdiction of this court is based upon Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925; Chapter 229, 43 Stat. 936, entitled "An Act To Amend The Judicial Code, and to further define the jurisdiction of the Circuit Court of Appeals and of the Supreme Court, and for other purposes," and reading as follows:

> "Sec. 240. (a) In any case civil or criminal in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect as if the cause had been brought there by unrestricted writ of error or appeal."

The special and important reasons advanced by the

petitioners and addressed to the Court's judicial discretion are set forth under Point IV of this petition entitled "Reasons relied on for the allowance of the writ."

The Circuit Court of Appeals for the Seventh Circuit on February 28, 1941, reversed the order and decree of the District Court of the United States for the Northern District of Illinois, Eastern Division. (R. 946)

A petition for rehearing was filed on March 14, 1941, within the time allowed by Rule 22 of the United States Circuit Court of Appeals for the Seventh Circuit. (R. 947)

The said petition for rehearing was denied and the original opinion filed by the court was modified by order of the court entered April 7, 1941. (R. 965)

The certified transcript of record, the Petition for the issuance of a Writ of Certiorari with the supporting brief annexed thereto are filed herein with the Clerk of this Court within three months after denial of the petition for rehearing by the United States Circuit Court of Appeals for the Seventh Circuit.

III.

QUESTIONS PRESENTED.

(1) Whether a purchaser of a non-negotiable instrument long after default is made in payment of interest and principal can be said to be a bona fide purchaser for value without notice.

(2) Whether a party to a contract which is performable at the time of the occurrence of a future event may put an obstacle in the way of the happening of that event, so as to be relieved of his obligation to perform.

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The decision of the Circuit Court of Appeals for the Seventh Circuit in this case decided the following important questions of local law contrary to local decisions on similar questions, namely:

1. That respondent, John G. Getz, Jr., was a *bona fide* purchaser for value of the non-negotiable certificates of indebtedness sued upon, when the evidence showed such certificates were purchased by respondent, after default had been made in the payment of both principal and interest.

2. That performance of the refunding contract between the City of Harvey and A. C. Allyn & Company was excused because it was dependent on the occurrence of a future event, which remained unsatisfied, when the evidence showed that the occurrence of the future event was prevented solely by the act of A. C. Allyn & Company.

PRAYER.

WHEREFORE, your petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Seventh Circuit, commanding that court to certify and send to this Court for review and determination on a day certain to be therein named, a full and complete transcript of record of all proceedings in the case, numbered and entitled on its docket, No. 7411, *John G. Getz, Jr., Plaintiff-Appellant* v *City of Harvey, a Municipal Corporation, et al., etc.;* that said judgment

of the Circuit Court of Appeals for the Seventh Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises, as to this Honorable Court shall seem meet and just; and your petitioners will ever pray.

CITY OF HARVEY, a Municipal Corporation, FRANK W. BRUGGEMANN, Mayor of the City of Harvey, CHARLES H. APPLEGATE, JR., ARTHUR E. TURNGREN, NORMAN C. GALLET, GEORGE P. FISHER, Commissioners of the City of Harvey, W. L. VOSS, Treasurer of the City of Harvey, GEORGE P. FISHER, Commissioner of Public Property, and R. E. MALLSTROM, Superintendent of the Water Department,

Petitioners.

By JOHN J. DOWDLE,
Counsel for Petitioners.

ALBERT O. HOFFMAN,
WILLARD C. WALTERS,
Of Counsel.